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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 357

AMERICAN LIFE AND ACCIDENT INSURANCE COMPANY and AUTOMOBILE OWNERS SAFETY INSURANCE COMPANY,

Petitioners,

v.

FEDERAL TRADE COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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American Life and Accident Insurance Company (hereinafter sometimes called "American") and Automobile Owners Safety Insurance Company (hereinafter sometimes called "Automobile Owners") pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Eighth Circuit entered in the above causes on June 13, 1958.

OPINIONS BELOW

The interlocutory and final opinions of the Federal Trade Commission (AR. 47-54, 108-112; OR. 34-39)[1]

[1] Record references designated "AR." and "OR." refer to the printed transcripts of the records in the court below in *American Life and Accident Insurance Company* v. *FTC*, No. 15828, and

are not yet reported, but they are printed in appendices B and C. The opinions and dissenting opinions in the Court of Appeals (AR. 164-75; OR. 98-104) are reported at 255 F. 2d 289, 294 (8th Cir. 1958), appendix B, and 255 F. 2d 295, 298 (8th Cir. 1958), appendix C, respectively.

JURISDICTION

The judgments of the Court of Appeals (AR. 176, 177; OR. 105) were entered on June 13, 1958, and are found in appendices B and C. Timely petitions for rehearing were denied on the same date (AR. 187; OR. 114), and are reported in appendices B and C. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and Section 5(c) of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U. S. C. § 45(c)).

QUESTIONS PRESENTED

1. In *FTC* v. *National Cas. Co.*, 357 U. S. 560, this Court held that the McCarran-Ferguson Act "withdrew from the Federal Trade Commission the authority to regulate [insurance companies'] advertising practices in those States which are regulating those practices under their own laws" (357 U. S. at 562-563). The question presented is whether, under that Act, the Federal Trade Commission has jurisdiction of the advertising practices of an insurance company licensed only in the state of its domicile and conduct-

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Automobile Owners Safety Insurance Company v. *FTC*, No. 15830, respectively, which transcripts have been filed with the Clerk. The corresponding references "ATr." and "OTr." refer respectively to the full transcripts of the proceedings in the Federal Trade Commission, which were lodged with the Court of Appeals but were not printed.

ing business with persons in other states by mail, when the domiciliary state is regulating the advertising practices of such companies under its own laws.

2. The Federal Trade Commission regularly issues "Trade Practice Rules." These are rules interpreting and applying the general requirements of the Federal Trade Commission Act in terms of the practices of particular industries, for the guidance of industry. The Commission's Bureau of Consultation advises industry members as to their compliance with such Rules. The question presented is whether a cease and desist order against certain advertisements is valid when (a) the advertisements were in compliance with the Commission's Trade Practice Rules; and (b) the advertisements had been submitted to, reviewed and approved by the Commission; and (c) the Commission gave no notice of disapproval or opportunity to petitioner to make any change prior to issuance of its formal and public complaint of deception; and (d) the Commission refused to consider proof of the Trade Practice Rules, petitioner's compliance, and the prior approval on the ground that all such matters were irrelevant.

STATUTES INVOLVED

1. Sections 5 and 6 of the Federal Trade Commission Act, 38 Stat. 719, 721, as amended, 15 U. S. C. 45, 46, provide in part as follows:

> Sec. 5(a)(1). Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of compe-

tition in commerce and unfair or deceptive acts or practices in commerce.

* * * *

Sec. 6. That the Commission shall also have power * * * *

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

2. The Act of March 9, 1945 (59 Stat. 33, as amended, 61 Stat. 445, 15 U. S. C. §§ 1011-1014) (herein referred to as the McCarran-Ferguson Act), is set forth in full in Appendix A, *infra*. The immediately pertinent provision of that Act is the proviso to § 2(b) thereof, which reads as follows:

"*Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

3. Chapter 376, "Life and Accident Insurance," of the Revised Statutes of Missouri, 1949, contains the following provisions:

"*376.590. Misrepresentations, false estimates and circulars prohibited—agents—notes to be held until policy delivered.*

1. No life insurance company doing business in this State, and no officer, director, or agent thereof, shall issue or circulate, or cause or permit to be issued or circulated, any estimate, illustration, circular or statement of any sort misrepresenting the terms of any policy issued by it or the benefits or advantages promised thereby, or the dividends

or shares of surplus to be received thereon, or shall use any name or title of any policy or class of policies misrepresenting the true nature thereof * * *.

"*376.600. Penalty for violating section 376.590.* Any life insurance company which may violate any of the provisions of section 376.590, or which may permit any of its agents or representatives in this state to violate said provisions, shall have its certificate of authority or license to transact business in Missouri revoked by the state superintendent of insurance, and shall be for a period of five years barred from the further transaction of business in this state; and any agent, solicitor or representative in this state of any such insurance company who shall violate any of the provisions of said section shall be deemed guilty of a misdemeanor * * *."

STATEMENT OF THE CASE

In October 1954, the Federal Trade Commission issued complaints against petitioners (AR. 2; OR. 2) alleging that they had violated the Federal Trade Commission Act by falsely advertising some of their accident and health insurance policies. Petitioners denied that their advertising was false or misleading, and alleged (1) that under the McCarran-Ferguson Act, the Commission was without jurisdiction over their business because the business was regulated by state law and (2) that the very advertisements alleged to be misleading had been approved by the Commission pursuant to the Commission's Trade Practice Rules for the Advertising and Sales Promotion of Mail-Order Insurance, (15 FED. REG. 599), to which petitioners were signatory, and which were then valid and subsisting (AR. 13-17; OR. 8-11).

1. Facts.[2]

a. (*Jurisdiction*). American is a Missouri corporation, with its home office in St. Louis, Missouri (AR. 19). It is licensed under Missouri law as a life insurance company (AR. 20). It has no offices or agents outside Missouri, and is licensed in no other state (*ibid.*). Its gross receipts from accident and health business in interstate commerce are less than $150,000 a year (*ibid.*).

American's operations, including the preparation and mailing of advertising literature, the underwriting and issuance of policies, and the handling of claims, take place at the home office (*ibid.*). Its sole method of soliciting business is to mail form letters, descriptive material, and application forms to prospective policyholders throughout the country (*ibid.*).[3] Interested prospects are asked to complete the application forms and return them, with initial premium, to the Company, which then passes upon the application without medical examination, and administers the policies by mail (AR. 27-28). It sells about 2,000 of its "Provider" policies a year in this manner to persons residing outside Missouri (AR. 26).[4]

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[2] The facts are stated in part in terms of the *American* case. The variations which exist in the facts of the *Automobile Owners* case are indicated below in footnotes where appropriate.

[3] American at one time used radio advertising, but such use ceased before the Commission filed its complaint herein (AR. 27, 40).

[4] Automobile Owners' gross sales in interstate commerce of its two policies alleged to have been misrepresented were 38,882 and 63,879 policies respectively in the two-year period covered by the complaint (OR. 13-14). It also is a Missouri company, licensed only in Missouri (OR. 13). It is licensed only as a casualty company. It advertises solely by mail; the composing of its advertising takes place in Missouri; the actual mailing occurs in Illinois (OR. 14).

When the complaints were issued, and continuously to the present, Missouri has had a statute (*supra*, pp. 4-5), "essentially the same" (*FTC* v. *National Cas. Co.*, 357 U. S. 560, 564 n. 6) as the so-called "Model Unfair Trade Practices Bill for Insurance."

The Missouri Department of Insurance administers this Missouri false advertising law as part of its general administration of the insurance laws, under which it has powers of visitation, investigation, and enforcement, covering the advertising, policy forms, financial, underwriting, claims, and other aspects of the business of all Missouri-licensed companies (AR. 24; OR. 65-80). The Missouri Department's counsel testified before the Commission in these proceedings that his office regulates false advertising practices through an informal complaint procedure,[5] in which complaints and questions raised both orally and in writing, from other state insurance departments and from members of the public residing both within and without Missouri, are investigated (AR. 131, 136; OR. 66, 70). Where deceptive advertising is found, it is ordered to be stopped (*ibid.*). The procedure, while informal at the initial stage, is backed by the power, under the false advertising statute, of penal sanctions and of suspension or revocation of licenses to engage in the insurance business (AR. 136, 139; OR. 70-71, 74).

b. (*Trade Practice Rules*). Both petitioners were signatories to the Trade Practice Rules Relating to the Advertising and Sales Promotion of Mail-Order Insurance (15 FED. REG. 599) promulgated by the Commission February 3, 1950 (AR. 118-119; OR. 81).[6]

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[5] The complaint procedure is used in lieu of prior restraints, because of a departmental policy against censorship (AR. 136; OR. 70).

[6] American became a signatory when the Rules were promulgated; Automobile Owners became a signatory upon its organization in 1953 (AR. 118-119; OR. 81).

Pursuant to the Commission's regular practice under such rules, petitioners immediately turned their written advertisements over to the Commission's Bureau of Industry Cooperation[7] for approval under the Rules. As new advertisements came into use they were submitted to the Bureau in the same manner. In this way the Bureau several times reviewed petitioners' advertisements, including each of the advertisements charged in this proceeding to be misleading and deceptive (and each of those put in evidence in these cases)[8] was reviewed by that Bureau under the valid subsisting Trade Practice Rules[9] and pronounced unobjectionable (AR. 119-125; OR. 81-84). On two occasions the Bureau suggested revisions, which the petitioner promptly made (AR. 120-121, 123-125). Petitioners were repeatedly told that the advertisements complied with the Rules and the law (AR. 120, 123, 125; OR. 82). Immediately before the complaints in these cases were filed by the Commission, petitioners were assured by the Bureau and by the Commission that petitioners' cooperation with the Commission was appreciated, that there were no objections on the Commission's part, under the Rules or otherwise, to their advertisements, and that the Commission had received no complaints (from members of the public, public bodies, or otherwise) about petitioners (AR. 126-127; OR. 82). Petitioners first

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[7] This Bureau is now known as the Bureau of Consultation (AR. 119, 120; OR. 81).

[8] In the case of Automobile Owners, advertising relating to one of the two insurance policies in evidence was reviewed (OR. 83).

[9] The Rules remained in force until their repeal on August 22, 1956 (21 FED. REG. 6332), at which time the proceedings below had been pending for almost two years.

learned of the Commission's complaints from its press releases (AR. 127; OR. 83).

2. Proceedings Before the Commission.

Petitioners each moved before the hearings in the Commission and after the close of the case in support of the complaint for dismissal on the ground that the Commission was without jurisdiction of insurance matters (AR. 19; OR. 12). The Hearing Examiner denied all the motions (AR. 19; OR. 13). Petitioners also preliminarily moved for dismissal or separate hearing on the ground that their compliance with the Trade Practice Rules barred the proceedings (*ibid.*). The Examiner certified these motions to the Commission, which denied them (*ibid.*).

Before presenting evidence in its defense, American applied to the Commission, pursuant to the Commission's Rules of Practice, for production of the evidence in the Commission's possession relating to American's trade practice rule compliance (AR. 89). American also procured a subpoena duces tecum for the production of the same evidence (AR. 95). The motion was denied by the Commission and petitioner was refused access to the evidence on the ground that "the documents or information requested are in no way relevant or material to any issue in the proceeding" (AR. 107). The Hearing Examiner quashed the subpoena duces tecum on the same grounds (AR. 99, 108-111). By its ruling, the Commission determined finally, within its own procedure, that proof that the very advertising complained of had been approved by the Commission under the Trade Practice Rules, was

irrelevant.[10] The ruling was not then judicially reviewable because no final order had been entered.[11]

The Commission counsel had not in support of the charge produced any evidence of complaints from any policyholder of petitioner; or prospective purchaser or any member of the public. Petitioner attempted to force disclosure of the total absence of complaint by an application for release of information addressed to the Commission (AR. 90). This information was refused (AR. 107). It was, however, noted on the record that the Commission had received no complaints from any source with respect to petitioner's advertisements (AR. 102-103).

Petitioners then proceeded with their remaining evidence (AR. 112-145; OR. 65-86). The Examiner permitted petitioners to refer to the Rules and to show the general procedure of submitting advertisements to the Commission (AR. 114-130; OR. 81-84), solely as evidence of petitioners' good character and intent (ATr. 461-467). On the basis of the Commission's decision as to the irrelevancy of rules and compliance with rules, the Examiner excluded petitioner's evidence of its compliance with the Rules, by submission, review and approval of the advertisements in issue by the Commission's staff, and the Rules

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[10] The ruling of the Commission extended to the point of refusing the production of American's own insurance policy forms and advertisements, which had been submitted by American to the Commission for approval under the Trade Practice Rules (AR. 94-95).

[11] In the *Automobile Owners* case, the Hearing Examiner ruled that the parties would be bound, as to the production of such evidence, by the Commission's rulings in the *American* case (OR. 85-86).

themselves as related to the issues of deception (AR. 145-147; OTr. 400-401).

The Examiner then rendered initial decisions (AR. 17-42; OR. 12-25) in which he ordered both complaints dismissed on the ground that, consistently with their practice of following all suggestions emanating from the Commission as to the content of their advertising (AR. 113), each petitioner had ceased the use of the offensive advertising (AR. 40-41; OR. 23-25). Under Commission practice, such an "abandonment" of offensive practices, in circumstances which indicate the unlikelihood of their resumption, is ground for discretionary dismissal. The Examiner found that even the existing incomplete record was enough to establish the unlikelihood of petitioners' resuming use of the abandoned advertisements, stating (AR. 41), "[petitioner] has shown its good faith by word and deed."[12]

The Commission trial staff appealed to the Commission from the Examiner's orders of dismissal (AR. 43; OR. 34). The Commission had recently held, in accordance with a position frequently put forward by it, that the defense of abandonment could not be urged by a party who continued to contest the Commission's jurisdiction or to deny the unlawfulness of the party's actions.[13] In reliance upon this doctrine,

[12] The Examiner found, despite the McCarran-Ferguson Act, that the Commission had jurisdiction of petitioners' transactions with nonresidents of Missouri.

[13] This doctrine that defenses going to the Commission's jurisdiction or to the merits of its charges must be waived as a prerequisite to reliance upon the defense of abandonment was stated, among other cases, in the decision of the Commission which was finally reversed by this Court in *FTC* v. *National Cas. Co.*, 357 U. S. 560.

counsel for the Commission stated to the Commission (ATr. 452; OTr. 332):

> "The Commission has been afforded no basis for a conclusion that practices will not be resumed in the future. Respondent has continually denied that any of its advertising is or ever was false, misleading and deceptive."

Each petitioner therefore stated to the Commission, in briefs in support of the Examiner's order, that petitioner was "now prepared to concede that it has violated the law and that the Commission has jurisdiction." (ATr. 503-504; OTr. 369).

Thereupon, the Commission entered its final orders, holding, despite the McCarran-Ferguson Act, that it had jurisdiction; adopting portions of the Examiner's orders which found some of petitioners' advertising, although true, misleading because insufficiently detailed (AR. 47; *cf.* OR. 27-32); substituting similar findings for the Examiner's findings that other portions of the advertising were not false, misleading, or deceptive (AR. 43-46); and reversing in each case the Examiner's finding of abandonment (AR. 47-54; OR. 34-39). Cease and desist orders were accordingly entered (AR. 47; OR. 33-34).

3. The Decisions Below.

On petition to review and on oral argument, American advised the Court of Appeals that petitioner would not argue the question of jurisdiction, but that the question could not be waived and that litigation on that issue was pending in this Court and in the

Eighth Circuit.[14] Petitioners argued to the Court of Appeals that the Commission had erred in preventing them from proving their compliance with the Trade Practice Rules.

The Court of Appeals held (2-1, Judge Johnsen dissenting) that whether or not petitioners had complied with the Trade Practice Rules and whether or not petitioners' advertising had been examined and approved by the Commission under the Rules "would not seem to be here material because petitioner is not charged with a violation of these trade practice rules but is charged with a violation of the Federal Trade Commission Act" (255 F. 2d at 292, AR. 168; 255 F. 2d at 297, OR. 100). The court also held (Judge Johnsen dissenting) that the effect of compliance with the Trade Practice Rules was not before it because of petitioners' statement of "waiver" to the Commission in support of the Examiner's favorable order dismissing the complaint on the ground of abandonment. Both petitioners applied for rehearing, pointing out that they regarded the "waiver" as having been conditional upon the Commission's accepting the defense of abandonment, that the "waiver" was forced upon them against their will, and, in the *American* case, that in no event could a waiver confer jurisdiction on the Commission, or on the Court of Appeals (AR. 185). The petitions for rehearing were denied (AR. 187; OR. 114).

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[14] In the same circuit that decided the instant case, test litigation was then and is now being conducted on the precise jurisdictional problem involved herein. *Travelers Health Ass'n* v. *FTC*, No. 15743, 8th Cir., originally argued on November 13, 1957. Reargument on this case has been ordered for September 13, 1958.

REASONS FOR GRANTING THE WRIT

1. JURISDICTION.

a. This Case Presents a Question of Wide Public Importance As to the Scope of the Regulatory Power of the Federal Trade Commission.

The jurisdictional question here presented, which was reserved by this Court in its opinion in *FTC* v. *National Cas. Co.*, 357 U. S. 560, requires determination of the intent of Congress, as expressed in the McCarran-Ferguson Act, with regard to the extent of Federal Trade Commission jurisdiction over insurance practices which involve the dissemination of advertising by mail into states where the insurance company is not licensed and has no licensed agents, when the insurance company's domiciliary state adequately regulates the practices.

The question is of importance not only in a number of pending cases before the Commission and in the courts of appeals,[15] but also as to the future jurisdiction of the Commission. And it is important in the regulation not only of the substantial segment of the insurance industry that operates principally by mail without the intervention of licensed agents, *c.f. Traveler's Health Ass'n* v. *Virginia*, 339 U. S. 643, but also of the vast portion of that industry that operates through licensed agents in some states, but is licensed in fewer than all forty-nine states, *c.f. McGee* v. *International Life Ins. Co.*, 355 U. S. 220. The latter portion of the industry, whether or not it wishes to operate in states where it is not licensed, is compelled

[15] Of the forty-one cases instituted by the Commission against the accident and health insurance industry to date, six involved companies then licensed in only one state. Twenty-six more involved companies licensed in less than all the states.

by practical necessity to deal by mail with policyholders, who, although initially contacted through licensed agents in states where the company is licensed, have migrated to states in which the insurer is not licensed and has no licensed agents.

b. The Commission Was Without Jurisdiction.

This Court's decision in the *National Casualty* case makes clear that the problem remaining to be resolved by this Court is the question of "the intent of Congress with regard to interstate insurance practices which the States cannot for constitutional reasons regulate effectively." *FTC* v. *National Cas. Co.*, 357 U. S. 560. This intent appears clearly from the legislative history of the McCarran-Ferguson Act.

The overriding motive of its Congressional sponsors was to restore the balance of state-federal regulatory power to its *status quo ante United States* v. *Southeastern Underwriters Ass'n*, 322 U. S. 533. In that status the sole jurisdiction was in the states. This purpose was clearly expressed to Congress in the formative stages of the Act (*e.g.*, S. Rep. No. 1112, 78th Cong., 2d Sess. 3 (1944); see also H. Rep. No. 873, 78th Cong., 1st Sess. 1 (1943)):

> "The purpose of the bill is clear. It would affirm the intent of the Congress that the regulation of the business of insurance remain within the control of the several States, where it now [*i.e.*, pending the final outcome of *Southeastern Underwriters*] exists."

Existing state regulation was then said to be subject to constitutional limitations, arising from the Due Process Clause, on the power of states other than the domiciliary state of each insurance company to regu-

late the transactions carried out by mail by such companies with citizens of the other states. *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Minnesota Commercial Men's Ass'n* v. *Benn*, 261 U. S. 140; *cf. St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U. S. 346; *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426; *Compania General de Tobacos* v. *Collector of Internal Revenue*, 275 U. S. 87; *Connecticut Gen. Life Ins. Co.* v. *Johnson*, 303 U. S. 77; but *cf. Osborn* v. *Ozlin*, 310 U. S. 53; *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313. But it is certain that Congress knew of these limitations when it enacted the McCarran-Ferguson Act. The House Committee which recommended the passage of Senator McCarran's bill, stated to the House (H. Rep. No. 143, 79th Cong. 1st Sess., 3 (1945)) and Senator McCarran stated to the Senate (91 CONG. REC. 1442):

> "Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer* v. *Louisiana* (165 U. S. 578), *St. Louis Cotton Compress Co.* v. *Arkansas* (260 U. S. 346), and *Connecticut General Insurance Co.* v. *Johnson* (303 U. S. 77), which hold, inter alia, that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way."

Acting with this knowledge to pass a bill the purpose of which was the withdrawal of federal regulation in favor of the former *status quo*, Congress cannot have intended that the then existing Due Process limitations should be a ground for conferring jurisdiction on

a federal agency. The proviso of section 2(b) of the Act reflects an intention to cause the states, within the constitutional limits of their power, to enact more effective regulatory laws; but it would pervert the basic purpose of the sponsors of the Act to say that the proviso was intended to insert federal regulation into the interstices of state power. On the contrary, in the formative stages of the Act, the House Committee reported (H. Rep. No. 873, 78th Cong., 1st Sess. 9 (1944)):

> "All insurance policies are entered into in one State or another and that State in which they are entered into may through State regulation meet all problems presented. * * * The fundamental fact is that under the law as it exists today [before the final decision in *Southeastern Underwriters*] each state has ample power to regulate as it may see fit."

Nothing in the proviso of Section 2(b) of the McCarran-Ferguson Act or its legislative history requires an interstate insurance transaction to be "regulated" by two or more states. In the present case Missouri fully regulates petitioners' transactions: if one of petitioners uses false advertisements, Missouri can and will stop it; and to interpret the law as requiring other states to go through the duplicative formality of also ordering it stopped, on pain of Federal Trade Commission intervention for the purpose of going through the same duplicative formality, reduces the Act to an absurdity.

The Commission has suggested (*e.g.*, Opinion of Chairman Gwynne, *In the Matter of Travelers Health Ass'n*, FTC Docket No. 6252) that the domiciliary state's statutes are not meant to have and constitutionally cannot have extraterritorial effect. There are

several short answers: (1) the Missouri statutes in this case need not operate extraterritorially to prevent Missouri companies from disseminating false advertising to persons in other states; all of petitioners' acts, including the drafting, preparation, and mailing[16] of their advertisements, take place within Missouri; (2) the Missouri Department of Insurance testified in this case that it interprets its law as applying, and applies it, to the deception of persons living outside Missouri; (3) the power of Missouri to compel Missouri insurance corporations not to defraud persons outside Missouri is unquestionable. *E.g., Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322; *Alaska Packers Ass'n* v. *Industrial Acc. Comm'n*, 294 U. S. 532; *cf. Watson* v. *Employers Liab. Assur. Corp.*, 348 U. S. 66.

c. The Court Below Erred in Failing to Consider the Issue of Jurisdiction.

The Court did not discuss the question of the Commission's jurisdiction to institute the proceeding, except to note what it regarded as petitioners' waiver (255 F. 2d at 290, 292; AR. 165, 169-170; 255 F. 2d at 296, OR. 99). The court evidently was of the opinion either that the jurisdiction of the Commission was so manifest that it did not merit explicit consideration, or that petitioners' "waiver" had enlarged the statutory jurisdiction of the Commission. Either view is seriously erroneous. The first view, which it is less

[16] In the case of *Automobile Owners* the mechanics of mailing occur in Illinois, but the drafting of the content of the advertisements takes place in Missouri.

likely that the court held,[17] is shown above to be erroneous. The latter, and more probable view of the court's holding involves even plainer error.

Apart from the fact that the court misinterpreted petitioners' conditional offers of waiver (as is shown below (pp. 26-28)), nothing is more clearly settled than the proposition that a court's or agency's jurisdiction over the subject matter of a suit or proceeding cannot be conferred by consent or waiver. On the contrary, it is the recognized duty of this Court as well as every other federal court to consider the question of jurisdiction over the subject matter *sua sponte*. *United States* v. *Corrick*, 298 U. S. 435; *United States* v. *Griffin*, 303 U. S. 226; *Chicago B. & Q. R. Co.* v. *Willard*, 220 U. S. 413; *Louisville & N. R. Co.* v. *Mottley*, 211 U. S. 149; *NLRB* v. *Swift & Co.*, 233 F. 2d 226 (8th Cir. 1956).

Petitioner therefore urges this Court either to consider the question of jurisdiction itself or to reverse and remand the case to the court below for a clear determination on the jurisdictional question which it is now considering in *Travelers Health Ass'n* v. *FTC*, No. 15743 (8th Cir.) and which it passed over in silence in the present cases.

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[17] Since the court below has ordered reargument in test litigation, *Travelers Health Ass'n* v. *FTC*, No. 15743, 8th Cir., (see note 10, *supra*, p. 8), and since *FTC* v. *National Cas. Co.*, 357 U. S. 560, was then still pending in this Court, the Court of Appeals could hardly have deemed jurisdiction so clear as to require no comment.

2. Trade Practice Rules.

a. The Question of the Meaning and Effect of the Commission's Trade Practice Rule Program Is of Widespread Importance to Industry and to the Public.

The framers of the Federal Trade Commission Act, conscious of a need to substitute administrative certainty for statutory elusiveness (see, *e.g.*, President Wilson's message to Congress proposing creation of the Commission (51 CONG. REC. 1963 (1914)),[18] decided, after due deliberation, that the Act itself should not spell out all known possible unfair trade practices but rather should be phrased in general terms, permitting the agency itself with its expert knowledge to complete the legislative work. (See, *e.g.*, S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914)). Thus we are to "think of the legislation as unfinished law which the administrative body must complete * * *. The Congress * * * leaves the rounding out of its command to another smaller and specialized agency." (Mr. Justice Jackson, dissenting, *FTC* v. *Ruberoid Co.*, 343 U. S. 470, 485-486). The Federal Trade Commission Act (Section 6(g), *supra*, p. 3) gives the Commission a rule-making power. Thus the Commission may fulfil its duty of "rounding out" the command of Congress both by the process of decision and by the process of rule-making. *SEC* v. *Chenery Corp.*, 318 U. S. 80, 92-93; *SEC* v. *Chenery Corp.*, 332 U. S. 194, 201, 203.

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[18] "The business of the county awaits also, has long awaited and has suffered because it could not obtain, further and more explicit definition of the policy and meaning of the existing anti-trust law. * * *

"And the businessmen of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body * * *."

The Commission since 1918 has regularly exercised its powers by promulgating "trade practice rules." These are rules defining unfair or deceptive acts or practices in the terms and circumstances of particular industries, "for"—in the Commission's words—"the guidance of businessmen (§ 2.21, *Rules of Practice, Procedure, and Organization, Federal Trade Commission,* 20 FED. REG. 3061, as amended, 16 C. F. R. § 2.21). Trade Practice Rules are enacted pursuant to procedure set forth in detail in the Commission's Rules of Practice (*ibid.*) published pursuant to the Administrative Procedure Act. The procedure contemplates public notice and rule-making hearings and Federal Register publication of the proposed rules and the rules adopted. The Commission's procedure conforms in detail with that prescribed by Section 4 of the Administrative Procedure Act (60 Stat. 238, 5 U. S. C. 1003) for substantive rule-making. In this manner the Commission allegedly gives the law some of the detailed clarity that industry seeks.[19]

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[19] The Commission describes the function of trade practice rules as follows (Section 2.21, *Rules of Practice, Procedures and Organization*, 20 FED. REG. 3061, as amended, 16 C. F. R. § 2.21):

"*Purpose.* Trade practice rules are in the nature of advisory opinions for the guidance of businessmen. Trade practice conference rules are designed to eliminate and prevent, on a voluntary and industry-wide basis, trade practices and methods of competition and business behavior in an industry which constitute violations of laws administered by the Commission."

And again (ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION (1950), p. 60):

"It is the policy of the Commission to utilize the trade practice conference and stipulation procedures to encourage widespread observance of the law by enlisting the cooperation of members of industries and informing them more fully of the requirements of

The promulgation and observance of such rules is predicated upon the valid premise that those who comply satisfy the requirements of the Federal Trade Commission Act. When it promulgates rules for an industry, the Commission circulates them to known members of the industry, and asks them to sign a form signifying adherence to the rules promulgated (*Rules of Practice, etc., supra*, § 2.29); it advises those who adhere that potential violations of the rules or the Act will be dealt with through cooperative procedures rtaher than by litigated cease and desist proceedings.[20]

A Division of the Commission, the Division of Trade Practice Conferences, Bureau of Consultation, is assigned the task of administering trade practice rules and giving advice, consultation, and advance

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the law, so that wherever consistently possible the Commission may avoid the need for adversary proceedings against persons who, through misunderstanding or carelessness, may violate the law unintentionally."

[20] *Rules of Practice, etc., supra*, § 2.32:

"*Effect on pending proceedings*—(a) *Prior to complaint.* Upon the promulgation of trade practice conference rules for an industry an examination will be made of all charges of law violations by members of that industry then pending before the Commission which have not reached the formal stage through the issuance of complaint. In those instances in which the pending charges are adequately covered by the trade practice conference rules, and which are not excluded by the policy set forth in § 1.51 of this chapter, the Commission will consider the advisability of closing the matters. In such instances consideration will be given to whether or not a proposed respondent has subscribed to the trade practice conference rules for his industry, to whether or not there is adequate reason to believe that he is in fact complying with such rules and will continue to do so, and to whether or not the public interest requires any further proceedings."

consideration, in the light of the rules, of advertising submitted to it before use.[21] Separate provision is made in the Commission's budgets for the maintenance of the Division of Trade Practice Conferences (*e.g.*, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION (1957) p. 70).

Trade practice rules are currently in effect for 160 industries. (ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION (1957), p. 59). The practices of the Commission in promulgating and administering these rules have been regularly reported to Congress.[22] However, the question of the right of an industry member to rely on its compliance with such rules in an adjudicated case before the Commission is one of first impression in this Court. While it has been assumed that "presumably as a matter of good faith, [the Commission] would not bring an action against one whose conduct is in compliance with the rules * * *" (Comment, *Trade Rules and Trade Conferences; The FTC and Business Attack Deceptive Practices, Unfair Competition, and Antitrust Violations*, 62 YALE L. J. 912, 944 (1953)); and while the Commission has not hesitated to urge in litigated cases that violations of the rules are conclusive evidence per se of violation of the law (*e.g., Prima Products, Inc.* v. *FTC*, 209 F. 2d 405, 408 (2d Cir. 1954); *cf. Lazar* v. *FTC*, 240 F. 2d 176, 178 (7th Cir. 1957); *Burton-Dixie Corp.* v. *FTC*, 240

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[21] *Rules of Practice, etc., supra*, § 10(b):

"*Division of Trade Practice Conferences.* This Division administers the Trade Practice Conference program of the Commission."

[22] Such reports had been regularly made when in 1938, Congress extensively amended the Federal Trade Commission Act by the Wheeler-Lea Amendments (Act of March 21, 1938, c. 49, 52 Stat. 111). *E.g.*, ANNUAL REPORT (1936), p. 97.

F. 2d 166 (7th Cir. 1957)), there has been no definitive statement as to how far the members of the 160 affected industries may rely upon their compliance with the rules or their cooperation with the Commission as a defense against prosecution for using the approved advertising.

b. The Decisions Below Conflict With Decisions of This Court.

Trade practice rules were promulgated for petitioners' industry, which is known as the Mail-Order Insurance Industry, after the specified public notice, hearings, and proposed rules, in 1950 (See 13 FED. REG. 6778, 14 *id.* 2095, 15 *id.* 599). They were in effect when the complaint was issued in this proceeding. Immediately upon their promulgation petitioners signed the card signifying voluntary adherence to these Rules. Following regular practice, they submitted their advertisements to the Commission and the Commission undertook, through the Division of Trade Practice Conferences, Bureau of Consultation, the duty of examining the advertisements and advising petitioners as to their compliance with the Rules. Petitioners' advertisements—the very advertisements on which the presnt cease and desist orders are based—were thus examined on several different occasions; suggestions were made by the Commission for revision; and the advertisements were pronounced unobjectionable.[23]

[23] The Commission reported to Congress that it had had notable success in obtaining cooperative compliance from the mail-order insurance industry (*e.g.* ANNUAL REPORT (1952), p. 72):

"*Mail Order Insurance*—Under the continuing program of cooperative compliance negotiation, further progress has been made in an area of vital public interest in elimination of misrepresentation in advertising by firms engaged in the promotion and sale of

This practice of cooperative submittal, compliance, and approval was being carried on when, without notice or warning, without appeal or amendment of the Rules, and without having received any complaint against petitioners the Commission instituted these proceedings, alleging deception in the very advertisements it had previously approved. The Commission thus out of hand repudiated its commitment to petitioners to enforce the Act by cooperative and voluntary methods. It held petitioners up to public contempt as law violators.

The decision of the court below relegates all trade practice rules to an administrtaiva limbo in which their solemn promulgation and painstaking administration are meaningless formalities which can be ignored at the will of the Commission, at the same time it extols their value to Congress and the public. It conflicts with the decisions of this Court in which rules issued by administrative agencies—often with far less formality than that which the Commission issued these rules—have been held not only relevant but binding on the agency in litigation with persons affected. *E.g.*, *Service* v. *Dulles*, 354 U. S. 363; *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260; *Chapman* v. *Sheridan-Wyoming Coal Co.*, 338 U. S. 621, 629; *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 420; *School District 2*

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insurance in commerce by mail.' Success has been achieved particularly in the field of advertising of health, accident, and hospitalization insurance in securing modification of promotional material to avoid misrepresentation by including in such material disclosures of unusual exceptions, reductions and limitations in the policies, and notice, in instances where policies are so drawn, of provisions under which policy holders may be subject to assessments in excess of stated premiums."

Fractional v. *United States*, 229 F. 2d 681, 686 (6th Cir. 1956). And it ignores the vast body of law which recognizes that administrative regulations, their application by the administrators, and the administrators' application of the law are all evidence of the weightiest kind in proceedings involving the application or interpretation of the agency's organic statute. *E.g.*, *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139-140; *Alaska S.S. Co.* v. *United States*, 290 U. S. 256; *Norwegian Nitrogen Prod. Co.* v. *United States*, 288 U. S. 294, 311.

c. The Court's Alternative Ground of Decision Is Unfounded.

The court also held that petitioners had not preserved in the Commission the question of the admissibility of evidence pertaining to the trade practice rules. This is incorrect. Petitioners presented their contentions to the Commission at least twice: once on motion before taking of evidence, and again on application for production of evidence from the Commission's files relating to petitioners' compliance. The Commission denied both applications, holding that compliance and approval are irrelevant.

These holdings were not then open to judicial review because the Commission's final order had not yet been entered. However, section 10(c) of the Administrative Procedure Act preserved petitioners' right to later review. That section provides (60 Stat. 243, 5 U. S. C. § 1009(c)):

> "Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *"

Nor did petitioners intentionally relinquish their contention. Petitioners made the "waiver", upon which the court below seized, for the limited purpose of supporting before the Commission the Examiner's holding on the abandonment issue. For this purpose Commission practice made the waiver a prerequisite. But its effect was limited. Petitioners were saying to the Commission in effect, "If you hold in our favor on this issue, we will no longer deny that we have acted unlawfully or that you have jurisdiction," as one would offer to abandon claims or defenses in connection with an offer in compromise. When the Commission rejected the offer, petitioners' concession was rejected with it.

The court twisted this offer of conditional concession into an outright concession. The decision of the court below amounts to requiring a party before the Commission to give up valid defenses, including defenses going to the Commission's jurisdiction, as a price for asserting another, not inconsistent, valid defense. This Court has unequivocally rejected such a fictive and retrogressive approach in a constant effort to ascertain the real intention of the parties. *Cf. Oberding* v. *Illinois Cent. RR.*, 346 U. S. 338; *Green* v. *United States*, 355 U. S. 184, 193-194.

Moreover, the Commission itself did not give so broad an interpretation to petitioners' alleged concession. The Commission's opinions analyze the evidence and consider the lawfulness of petitioners' actions without reliance upon or reference to petitioners' alleged concession (AR. 47-54; OR. 34-39).

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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